161 U.S. 200

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 135.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

ISAAC S. LYON.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JULY 11, 1892.

(15,081.)

THE LAW ASSOCIATION
—OF—
PHILADELPHIA.

Transcripts
of
Records
1895

962

Supreme Court U. States

161 U.S.

200 — 256

(15,081.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 9, 1895.

a In the Supreme Court of the District of Columbia.

ISAAC S. LYON
vs.
DISTRICT OF COLUMBIA. } No. 24777. At Law.

UNITED STATES OF AMERICA, }
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed September 27, 1883.

In the Supreme Court of the District of Columbia.

ISAAC S. LYON
vs.
DISTRICT OF COLUMBIA. } At Law. No. 24777.

The plaintiff sues the defendant, a municipal corporation, for that the collector of taxes for the District of Columbia advertised, among other certain real estate in the city of Washington, District of Columbia, to wit, lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), and twelve (12), in square numbered one hundred and fifty-six (156), for sale at public auction, at his office, in the city of Washington, on the 5th of October, A. D. 1881, for non-payment of certain taxes assessed and in arrears thereon, and on said day sold said real estate to the plaintiff for the sum of $4,082.70, and upon the payment of said purchase-money by said plaintiff said collector executed and delivered to said plaintiff a certificate of tax sale for each one of said lots, and the plaintiff avers that said sales of said real estate by said collector as aforesaid were not made according to law and were void, and that as such purchaser he made application to the proper authorities of said District, to wit, to the Commissioners, to refund and pay to him the payment made by him on account of such purchase, which said defendant, through said Commissioners, wholly neglected and refused to do, whereby said defendant became indebted to the plaintiff in said sum of $4,082.70, which, although often requested, it has neglected and refused to pay, to the damage of the plaintiff in the sum of ten thousand dollars, and therefor- he brings his suit.

2d. And the plaintiff sues the defendant for money had and received by the defendant to the use of the plaintiff, which it,
2 although often requested, has wholly neglected and refused to pay, to the damage of the plaintiff in the sum of ten thousand dollars; for which he sues.

WM. F. MATTINGLY,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

WM. F. MATTINGLY,
Attorney for Plaintiff.

Summons.

Issued September 27th, 1883.

In the Supreme Court of the District of Columbia, the 27th Day of September, 1883.

ISAAC S. LYON, Plaintiff,
vs.
DISTRICT OF COLUMBIA, Defendant. } At Law. No. 24777.

The President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court on the first day of its first special term occurring 20 days after service of this writ on you, to answer the plaintiff's suit and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Cartter, chief justice.

[SEAL.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

WM. F. MATTINGLY, *Attorney.*

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

3 *Marshal's Return.*

Served copies of the declaration, notice to plead, affidavit, and this summons on the defendant. Copies and service rec'd the 29th day of September, 1883.

RIDDLE,
Attorney D. C.

Defendant's Pleas.

Filed November 12, 1883.

In the Supreme Court of the District of Columbia.

ISAAC S. LYON
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 24777.

1. The defendant for plea says that it never was indebted as alleged.

2. And for a further plea the defendant says that the collector of

taxes for the District of Columbia did, after due advertisement and on the fifth day of October, 1881, by the direction and request of the plaintiff, as the holder of the stock or scrip hereinafter mentioned, offer for sale and sell to the plaintiff, as the highest bidder, the property mentioned in this suit for default in payment of special taxes due thereon; that in payment the plaintiff, as the holder of certain securities purporting to be corporation stock or scrip that had been issued, without authority of law, against the corporation of Washington, as well as said property on account of default in payment of said special taxes, offered said stock or scrip, which was, without authority of law, received by the collector in payment and by him transmitted to the auditor of the District, who cancelled the same and forwarded such stock or scrip to the Treasurer of
4 the United States; that subsequent to such purchase by the plaintiff it was discovered that there had been a preliminary injunction issued against the sale of said property for such taxes, and that the collector had through mistake advertised the said property and sold the same notwithstanding such injunction; that upon the discovery of such mistake the sale to the plaintiff was declared null and void by said collector, of which the plaintiff had notice; that the purchase of said property by the plaintiff at said sale was made by him with full knowledge of the existence of such preliminary injunction, by reason whereof the defendant says the plaintiff is without remedy in the premises; and this the defendant is ready to verify.

FRANCIS MILLER,
Assistant Attorney for Defendant.

Joinder in Issue.

Filed November 28, 1883.

In the Supreme Court of the District of Columbia, the 28th Day of November, 1883.

Between—

ISAAC S. LYON, Plaintiff,
vs.
DISTRICT OF COLUMBIA, Defendant. } At Law. No. 24777.

The plaintiff joins issue upon the defendant's two pleas.

WM. F. MATTINGLY,
Attorney for Plaintiff.

5 *Stipulation of Facts, &c.*

Filed September 16, 1890.

In the Supreme Court of the District of Columbia.

ISAAC S. LYON
vs.
DISTRICT OF COLUMBIA. } At Law. No. 24777.

It is hereby stipulated and agreed by and between the respective parties hereto that the above-entitled cause may be tried by the court without jury upon the facts contained in the following statement, viz:

1. Henry Birch, the assignor of plaintiff, was a practical paver, and as such he set the curbstones and paved the footway and gutter (among other places) in front of lots 1 to 12, inclusive, in square 156, under a valid contract, executed in 1870, with the corporation of Washington.

2. The work was done in a good and workmanlike manner and under the supervision provided by law, and was at its completion duly measured and accepted by the corporation of Washington through its authorized officers.

3. The work was completed on or about November 17, 1870, and its cost, to be paid to the said Birch, amounted to the sum of $2,054.10, no part of which has ever been collected or paid.

4. Upon the completion of the work it was the duty of Wm. Forsythe, then superintendent and inspector of paving of footways, &c., under the act of June 10, 1867, to make all assessments on lots bordering on any street which shall have been paved (sec. 6), and without delay, after the completion of a pavement; to deposit with the register a statement exhibiting the cost of the work in front of each lot and the amount of tax to be paid by each lot-owner, and the register in turn was to place in the hands of the collector of taxes a list of the persons chargeable with such tax, and he in turn
6 was to give notice in writing to the respective lot-owners of the amount of tax due by them—act of May 23, 1853, sec. 6.

5. The said Wm. Forsythe neglected to assess the property as required by law, in that he withheld the statement of the cost of the work from the register and the assessment from record for 12 months after the completion of the work, or until November, 1871, this at the sole request and procurement of the owner of the said lots, whereby he, the owner, was enabled to sell and did sell said lots, without any record notice of said assessment, to the purchaser.

6. Between the time the work was completed and its attempted assessment against said lots the corporation of Washington had been succeeded by the government of the District of Columbia, and the officers under the corporation of Washington had been abolished and the said Forsythe was without authority to make any assessments against said lots; yet on or about November, 1871, the

records were erased and altered, whereby an assessment against said lots was interpolated over and above the signatures already made of the mayor, ward commissioner, and other officers of the corporation, presumably to make it appear that they had approved the same when, as a matter of fact, they had not.

7. On the 9th day of March, 1872, the District of Columbia, notwithstanding this action of Forsythe, issued and delivered to said Henry Birch four certificates of indebtedness against said lots for the cost of said work, signed by the governor and register, and said Birch sold and transferred the same to plaintiff for value before maturity. True copies of said certificates are attached hereto.

8. In June, 1874, these said lots were (among others) advertised to be sold by the collector of taxes for non-payment of said assessment or certificates; whereupon, through proper proceedings had, the supreme court of the District of Columbia, by its order passed in cause James M. Latta *vs.* The District of Columbia, John F. Cook, collector of taxes, and Theodore Sheckles, No. 4450, equity, enjoined the defendant from selling said lots through non-payment of said assessment or certificates, which said order has never been set aside, annulled, or reversed, but is still in full force and effect.

9. Neither said Henry Birch nor this plaintiff were made parties to said cause and neither of them had any knowledge of the order passed therein.

10. The collector of taxes, upon the service of restraining order issued in said cause, made no entry or memorandum of the same against said lots 1 to 12, in square 156, but by mistake entered the same in his office as applying to the same numbered lots in square 256.

11. On October 5, 1881, the collector of taxes, notwithstanding said injunction, again advertised said lots for sale, and did sell the same for the non-payment of the said assessment or certificates, and plaintiff became the purchaser of each of said lots, and there was then issued to him, upon the surrender by him of said certificates of indebtedness (which have been cancelled) and the payment of three dollars in money, the 12 certificates of tax sale, true copies of which are attached hereto.

12. At the time of said sale and purchase, viz., October 5, 1881, this plaintiff had no knowledge whatever of the restraining order passed in said cause No. 4450 or any of the proceedings therein, and neither he nor his assignor, Birch, were aware of any invalid proceedings connected with said assessment, and said purchase was involuntary on the part of the plaintiff and made to protect his interest in said certificates of indebtedness and save the same from sacrifice.

13. The certificates of indebtedness thus surrendered by this plaintiff were computed and accepted as valid by the District of Columbia at said sale at and for the sum of $4,079.70, which, with $3.00 paid in cash, made $4,082.70 as the purchase price paid for said lots on October 5th, 1891, by this plaintiff.

8 14. The supreme court of the District of Columbia, in February, 1885, by a decree passed in equity cause John B. Alley *vs.* Isaac S. Lyon, No. 8494, set aside this assessment and adjudged that it "did not create or constitute any lien upon the premises;" also that the sale of said lots by the collector of taxes, made on October 5, 1881, was "made contrary to law," and that the certificates of sale "were illegal and did not give the purchaser of said premises at said sale any right, title, estate, or interest in law or in equity to the said premises or any part thereof," and the present plaintiff was "perpetually restrained and enjoined from using, employing, or setting up *or* in any way whatsoever the said assessment, lien certificates or certificates of sale as legal and valid, and from claiming any right, title, or interest thereunder or by virtue thereof to the whole or any part of said lots"—3 Mackey, 456—which decree was affirmed by the Supreme Court of the United States—130 U. S., 177.

15. The assessment was illegally levied, and the collector of taxes was without authority and jurisdiction to sell, and said sale was not made according to law and void.

16. In 1882 the District of Columbia, upon the application of the then owner of said lots, paid to him the sum of $772.32 for the appropriation by it of the material put there by the said Birch under his said contract.

17. Plaintiff first learned of the invalid proceedings connected with said assessment and sale in the early part of 1882, and at once made application to defendant for a return of the certificates of indebtedness and the money accepted by the collector of taxes as the purchase price of said lots (tendering in return the certificate of tax sale), but said application was refused.

18. All acts of Congress and acts of the late corporation of Washington having any bearing hereon are to be considered as in evidence and may be read at the trial.

19. And should the court be of opinion that plaintiff is legally entitled to recover, it may give judgment in his favor for the amount paid by him at the sale, viz., $4,082.70, with interest thereon
9 from the 5th day of October, 1881.

ISAAC S. LYON, *Plaintiff.*
GEO. C. HAZLETON,
Attorney for D. C.
S. T. THOMAS,
Attorney for Def't.

$513.54. No. 819.

CITY OF WASHINGTON,
GOVERNOR'S OFFICE, *March 9th*, 1872.

City of Washington paving stock.

Be it known that there is due from the mayor, board of alderman, and board of common council of the city of Washington to Henry Birch or his assigns the sum of five hundred and thirteen $\frac{54}{100}$ dollars, being the amount due on the first installment, bearing interest from the 17th day of November, eighteen hundred and 71, at the rate of ten per centum per annum, being stock issued in pursuance of an act of the board of alderman and board of common counsel of the said city, passed on the twenty-eighth day of October, 1867, entitled "An act concerning paved footways," for setting the curbstone and paving the footway in front of square 156, lot- 1 to 12, inclusive, assessed to Thomas Young—

The principal and interest of which *is* to be paid out of the special-tax fund agreeably to the terms of the above-recited act.

H. D. COOK, { *Gov'r.* / *Mayor.*

JOHN F. COOK, *Register.*

Langran, Ogilvie and Co., stationers.

Endorsed.

For value received I hereby assign all my right, title, and interest in the within to Isaac S. Lyon.

HENRY BIRCH.

Pay to the order of the collector of taxes D. C. the amount of the within certificate on account of tax-sale (purchase) certificate of the property herein described.

Oct. 10, 1881.

ISAAC S. LYON.

Witness:
ALLEN C. CLARK.

$513.54. No. 914.

CITY OF WASHINGTON,
GOVERNOR'S OFFICE, *March 9th*, 1872.

City of Washington paving stock.

Be it known that there is due from the mayor, board of alderman, and board of common council of the city of Washington to Henry Birch or his assigns the sum of five hundred and thirteen $\frac{54}{100}$ dollars, being the amount due on the second installment, bearing interest from the 17th day of November, eighteen hundred and 71, at the rate of ten per centum per annum, being stock issued in pursuance of an act of the board of alderman and board of common council of the said city, passed on the twenty-eighth day of October, 1867, entitled "An act concerning paved footways," for setting the curbstone and paving the footway in front of square 156, lot- 1 to 12, inclusive, assessed to Thomas Young—

The principal and interest of which *is* to be paid out of the special-tax fund agreeably to the terms of the above-recited act.

H. D. COOK, *Gov'r.*

JOHN F. COOK, *Register.*

Langran, Ogilvie and Co., stationers.

Endorsed.

For value received I hereby assign all my right, title, and interest in the within to Isaac S. Lyon.

HENRY BIRCH.

Pay to the order of the collector of taxes D. C. the amount of the within certificate on account tax-sale (purchase) certificate of the property herein described.

Oct. 10, 1881.

ISAAC S. LYON.

Witness:
ALLEN C. CLARK.

11 $513.54. No. 926.

CITY OF WASHINGTON,
GOVERNOR'S OFFICE, *March 9th*, 1872.

City of Washington paving stock.

Be it known that there is due from the mayor, board of alderman, and board of common council of the city of Washington to Henry Birch or his assigns the sum of five hundred and thirteen $\frac{54}{100}$ dollars, being the amount due on the third installment, bearing interest from the 17th day of November, eighteen hundred and 71, at the rate of ten per centum per annum, being stock issued in pursuance of an act of the board of alderman and board of common counsel of the said city, passed on the twenty-eighth day of October, 1867, entitled "An act concerning paved footways," for setting the curbstone and paving the footway in front of square 156, lot- 1 to 12, inclusive, assessed to Thomas Young—

The principal and interest of which *is* to be paid out of the special-tax fund agreeably to the terms of the above-recited act.

H. D. COOK, *Gov'r.*

JOHN F. COOK, *Register.*

French, Langran and Ogilvie, stationers.

Endorsed.

For value received I hereby assign all my right, title, and interest in the within to Isaac S. Lyon.

HENRY BIRCH.

Pay to the order of the collector of taxes D. C. the amount of the within certificate on account tax-sale (purchase) certificate of the property herein described.

Oct. 10, 1881.

ISAAC S. LYON.

Witness:
ALLEN C. CLARK.

12 $513.54. No. 928.

CITY OF WASHINGTON,
GOVERNOR'S OFFICE, *March 9th*, 1872.

City of Washington paving stock.

Be it known that there is due from the mayor, board of alderman, and board of common council of the city of Washington to Henry Birch or his assigns the sum of five hundred and thirteen $\frac{54}{100}$ dollars, being the amount due on the fourth installment, bearing interest from the 17th day of November, eighteen hundred and 71, at the rate of ten per centum per annum, being stock issued in pursuance of an act of the board of alderman and board of common council of the said city, passed on the twenty-eighth day of October, 1867, entitled "An act concerning paved footways," for setting the curbstone and paving footway in front of square 156, lot- 1 to 12, inclusive, assessed to Thomas Young—

The principal and interest of which *is* to be paid out of the special-tax fund agreeably to the terms of the above-recited act.

H. D. COOK, *Gov'r.*

JOHN F. COOK, *Register.*

Langran, Ogilvie and Co., stationers.

Endorsed.

For value received I hereby assign all my right, title, and interest in the within to Isaac S. Lyon.

HENRY BIRCH.

Pay to the order of the collector of taxes D. C. the amount of the within certificate on account tax-sale (purchase) certificate of the property herein described.

Oct. 10, 1881.

ISAAC S. LYON.

Witness:
ALLEN C. CLARK.

13 OFFICE OF THE COLLECTOR OF TAXES
FOR THE DISTRICT OF COLUMBIA,
WASHINGTON CITY, *October 5th*, 1881.

I, John F. Cook, do hereby certify that, by authority in me vested as collector of taxes for the District of Columbia, I have, this fifth day of October, A. D. eighteen hundred and eighty-one, sold at public auction, in pursuance of a public notice or advertisement duly published and in accordance with the provisions of existing law, subject, however, to redemption within two years from said sale, lot two (2), in square numbered one hundred and fifty-six (156), assessed in the name of Thomas Young, for taxes due and remaining unpaid and unpaid penalties and costs, as follows, to wit:

Taxes due District of Columbia for fiscal year ending June 30, 188–		$.....
Penalties thereon		.....
Costs "		.....
Taxes due the corporation of Washington for—		
All of tax for paving and curbing footway	153 41	
Interest at 10% from November 17, 1871	151 29	
Costs thereon	25	
Total		$394 25

amounting to three hundred and four dollars and ninety-five cents, and that Isaac S. Lyon, being the highest bidder, became the purchaser thereof at and for the sum of three hundred and four dollars and ninety-five cents.

The receipt of the above taxes, penalties, and costs of the sale is hereby acknowledged.

Witness my hand and seal this fifteenth day of October, A. D. eighteen hundred and eighty-one.

(Signed) JOHN F. COOK, [SEAL.]
Collector of Taxes.

Witness:
(Signed) DAVID WARNER.

The following is a description of the above-mentioned property: — — —.

[Printed across the face in red ink:] This certificate is issued subject to the payment of all arrears of taxes before the issue of deed. —— ——, collector, D. C.

14 NOTE.—All the certificates are identical, except the certificate for lots 1 and 12 (being corner lots) are for $516.60 each, and the other 10 certificates are for 304.95 each.

I. S. LYON.

Endorsed: Certificate of sale for taxes by the collector of taxes for the District of Columbia, October 5, 1881; lot No. 2, square No. 156; assessed in the name of Thomas Young; sold to Isaac S. Lyon; amount paid at sale, $304.95.

SATURDAY, *February 28th, A. D.* 1891.

Session resumed pursuant to adjournment, Cox, justice, presiding.

ISAAC S. LYON, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 24777.

This cause having been submitted to the court, it is ordered that the same be certified to the general term, to be there heard in the first instance.

15 *Appearance of J. G. Bigelow.*

Filed October 29, 1891.

In the Supreme Court of the District of Columbia, the 29th Day of October, 1891.

ISAAC S. LYON
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 24777.

The clerk will please enter my appearance for the plaintiff.

J. G. BIGELOW,
Attorney for Plaintiff.

MONDAY, *January* 4, 1892.

Proceedings before the supreme court of the District of Columbia, sitting in general term, beginning the first Monday, January 4th, 1892.

Present, presiding: Chief Justice Edward F. Bingham and Justices Walter S. Cox and Charles P. James.

* * * * * * *

MONDAY, *March* 28, 1892.

Session resumed pursuant to adjournment.

Present: Chief Justice Bingham and Justices Cox and James.

* * * * * * *

ISAAC S. LYON
vs.
THE DISTRICT OF COLUMBIA. } 24777. Law. Cal. 139.

This cause having been referred to be heard here in the first instance upon the record of proceedings and upon the stipulations therein filed September 16th, 1890, and having been argued
16 by counsel of respective parties and considered, it is thereupon ordered, adjudged, and decreed that the plaintiff do recover against the defendant the sum of four thousand and eighty-two and $\frac{70}{100}$ dollars ($4,082.70), with interest thereon from October 5, 1881, till paid, together with his costs, to be taxed by the clerk, and have his execution therefor.

Order for Writ of Error.

In the Supreme Court of the District of Columbia, the 13th Day of June, 1892.

ISAAC S. LYON
vs.
DISTRICT OF COLUMBIA. } At Law. No. 24777

The clerk of said court will issue a writ of error in this case.

S. T. THOMAS,
Assistant Attorney, D. C.

17 UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein Isaac S. Lyon is plaintiff and The District of Columbia is defendant, as the same remains upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, this 23d day of June, A. D. 1892.

J. R. YOUNG, *Clerk.*

18 *Writ of Error to the Supreme Court of the United States.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between Isaac S. Lyon, plaintiff, and The District of Columbia, defendant, being No. 24777 at law, a manifest error hath happened, to the great damage of the said District of Columbia, as by its complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 13th day of June, in the year of our Lord 1892, and of the Independence of the United States the one hundred and sixteenth.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk.*

19 *Citation to the Supreme Court of the United States.*

The United States of America to Isaac S. Lyon, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington,

within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The District of Columbia is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness Edward F. Bingham, chief justice of the said supreme court of the District of Columbia, in the year of our Lord one thousand eight hundred and ninety-two.

June 13th, 1892.

E. F. BINGHAM,
Chief Justice.

On this eighteenth day of June, in the year of our Lord one thousand eight hundred and ninety-two, I acknowledge due service of copy of the above-named writ.

J. G. BIGELOW,
Att'y for Def't in Error.

Endorsed on cover: Case No. 15,081. District of Columbia supreme court. Term No., 135. The District of Columbia, plaintiff in error, *vs.* Isaac S. Lyon. Filed July 11, 1892.

within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The District of Columbia is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness Edward F. Bingham, chief justice of the said supreme court of the District of Columbia, in the year of our Lord one thousand eight hundred and ninety-two.

June 13th, 1892.

E. F. BINGHAM,
Chief Justice.

On this eighteenth day of June, in the year of our Lord one thousand eight hundred and ninety-two, I acknowledge due service of copy of the above-named writ.

J. G. BIGELOW,
Att'y for Def't in Error.

Endorsed on cover: Case No. 15,081. District of Columbia supreme court. Term No., 135. The District of Columbia, plaintiff in error, *vs.* Isaac S. Lyon. Filed July 11, 1892.

Office Supreme Court U. S.
FILED.
NOV 21 1895
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

October Term, 1895.

No. 135.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

v.

ISAAC S. LYON.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE DISTRICT OF COLUMBIA.

SIDNEY T. THOMAS,
ANDREW B. DUVALL,
Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1895.

No. 135.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

v.

ISAAC S. LYON.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE DISTRICT OF COLUMBIA.

STATEMENT.

This was action of *assumpsit* to recover against the District of Columbia the sum of $4,082.70, with interest from October 5, 1881, on the theory that the District had received that much money for the use of the plaintiff in error, which on demand it refused to pay over to him.

On the 2d of November, 1869, the late Corporation of Washington authorized the curbstones set and the foot-walks and the gutters paved on the north side of P street, between Sixteenth street and Rock Creek, agreeably to an ordinance of the city approved October 12, 1865. The Corporation contracted with Henry Birch to do the work, the cost of which, as to lots from 1 to 12 in square 156, was $2,054.10.

At this time William Forsyth was superintendent and inspector of improvements under the Corporation.

When Birch finished the work, Forsyth entered it in the ward-book with the proper proportionate charges against each lot along the line of the improvement, with the exception of the twelve lots before mentioned; as to those no entry was made until November, 1871, when there was interlined in red ink the following: "Entered November 17, 1870. The work was done at this date, but, by request of the owner, not entered until November, 1871. Wm. Forsyth, surveyor, D. C." On January 13, 1871, there was issued to Birch fifty-two certificates of indebtedness, commonly called "paving stock," in respect of this work, except as to the twelve lots in square 156. On the 21st of February, 1871, the Corporation of Washington was abolished and the present government of the District of Columbia established.

After the entry by Forsyth, in the assessment-roll in November, 1871, certificates of indebtedness were issued to Birch, the contractor, in respect of the twelve lots in square 156, agreeable to an act of the corporation of October 28, 1867, and he sold said certificate to Lyon, the plaintiff in this case. After these certificates fell due and for default in their payment, Lyon procured the collector of the District to sell the lots and bought them in, paying therefor by the surrender of the certificates of indebtedness and a slight difference in cash.

In return for his certificates or paving stock, Lyon obtained twelve certificates of tax sale, one in respect of each lot, bearing date October 15, 1881.

The difficulty with the twelve tax-sale certificates was, that at the time of the sale the collector had been enjoined from selling the property for the satisfaction of the certificates of indebtedness, and by mistake had noted the service of the restraining order as to the same numbered lots in square

256 and proceeded with the sale of the twelve lots in square 156.

ASSIGNMENT OF ERRORS.

1. The court below erred in holding that the tax-sale certificates issued to the defendant in error by the Collector of Taxes of the District of Columbia created any obligation on the part of the District to refund or pay to him the amount of the taxes for which the property mentioned in the certificates was sold.

2. The court below also erred in holding that the plaintiff in error was liable to the defendant in error in the sum of $4,082.70, being the amount of taxes for which the property specified in the aforesaid tax-sale certificates was sold October 5, 1881.

3. The court below also erred in not rendering judgment for the defendant in error on the agreed statement of facts. (Rec., pp. 4–6.)

POINTS OF LAW AND ARGUMENT.

I.

IN MAKING THE SALE OF THE TWELVE LOTS IN SQUARE 156 THE COLLECTOR OF TAXES ACTED AS THE AGENT OF LYON FOR THE COLLECTION OF HIS CERTIFICATES OF INDEBTEDNESS.

The Collector was not acting for the District of Columbia in the transaction, and if he sold the property at a time when he was enjoined from selling it, and loss resulted, Lyon, the purchaser, must bear that loss; nor is the District of Columbia liable in this action because an officer of the *old Corporation of Washington* neglected to do his duty in failing to enter an assessment at the proper time. The tax-sale certificates held by Lyon, and which are the basis of this action, on their face state that after two years from the sale the

purchaser will be entitled to deeds for the property sold. They contain no promise or obligation on the part of the District to pay Lyon any money. They were merely assignable choses in action. It is not pretended that the improvement of P street, in respect of which the certificates of indebtedness surrendered by Lyon in 1881, was made at the request of the District of Columbia, or that the District ever received any money in respect thereof for his use. On the contrary, the work was begun and completed by the old Corporation of Washington; and the contractor was paid for it in "paving stock" issued by that corporation.

This is not the case of a taxpayer, who, after having paid his taxes or assessments, sues to recover his money back on the ground of the illegality of the tax or assessment. Nor is it the case of a plaintiff suing the municipality to recover money actually paid to the corporation, and which it is against equity and good conscience for it to retain. Lyon never paid the District of Columbia any money in respect of the "paving stock" issued to Birch against lots numbered from 1 to 12 in square 156 in 1871, nor, except the sum of *three dollars*, in respect of the tax-sale certificates he now holds.

II.

The District of Columbia Was Not Bound to Reimburse the Defendant in Error.

His case is that of a purchaser at a tax sale who seeks to be reimbursed his purchase-money.

At common law, the purchaser at a tax sale comes strictly and rigidly within the rule of *caveat emptor*. The proceedings are of record, and he is chargeable with notice of every defect and irregularity appertaining to them. Besides, the power of the officer to sell is a naked power, statutory, and not coupled with an interest. The bidder therefore cannot

be considered a *bona fide* purchaser, in the customary sense of that phrase. And if his tax title proves to be worthless, he cannot recover the amount he has paid in an action for damages against the officer, the owner, or municipality.

Hamilton *v.* Valiant, 30 Md., 139.
Indianapolis *v.* Langsdale, 29 Ind., 486.
Wilmerton *v.* Phillips, 103 Ill., 78.
Packard *v.* New Limerick, 34 Me., 266.
Lynde *v.* Melrose, 10 Allen, 49.
Loomis *v.* Los Angeles Co., 59 Cal., 456.
Lyon Co. *v.* Goddard, 22 Kansas, 389.

III.

The Assignor of the Defendant in Error was Paid in Full for his Work.

The certificates (Rec., pp. 7, 8, 9 and 10) which were delivered to Henry Birch, the contractor, for the footway, were paving-stock certificates, issued in pursuance of an act of the Board of Aldermen and Board of Common Council of Washington city passed October 28, 1867, which certificates upon their face in terms provided, "The principal and interest of which is to be paid out of the special-tax fund." The corporation ordinance in force at the time (Webb's Digest of the Laws of the Corporation of Washington, p. 158) is as follows:

"The Mayor is authorized and required to issue certificates of stock bearing interest at the rate of six per centum per annum; *which stock shall be given in payment for* setting the curbstone and paving the footway of any street or avenue, or portion thereof, in pursuance of this act; and all such certificates shall specify for what improvement they were issued, and shall be redeemed out of the taxes levied and collected for the payment of said improvement; and so soon as the taxes levied under this law for any improvement aforesaid shall be collected and deposited to the credit of the ward

entitled to the same, it shall be the duty of the Register to give notice to the person or persons in whose name or names the certificate may be issued for said improvement that the corporation is prepared to redeem the same; after which notice the interest on said certificates shall cease."

The contractor under the provisions of this ordinance received these certificates in payment and discharge of any claim against the late Corporation of Washington for his work. The corporation engaged to be the mediary through which these certificates for his work should be collected, and when collected, engaged to turn over the money to him and upon no other condition. This was the utmost limit of its obligation in the premises. The contractor with full knowledge of this ordinance and this mode of receiving payment for his work, performed the work, and, of course, could not upon failure to realize his expectation change this express contract and create a liability which did not exist.

The defendant in error relied upon section 158 of the Revised Statutes of the District of Columbia, which reads as follows:

"In all cases of sales of real property for taxes due in the city of Washington, where such sales shall not have been made according to law, and void, it shall be lawful for the proper authorities, on the application of the purchaser, or other person entitled under him, to refund and pay to such person the amount paid by him on account of such purchase, and also the subsequent taxes accrued and paid on the same property."

This relates exclusively to proceedings for the collection of general taxes. There is a well-settled distinction between general taxes and special assessments. "Taxes" do not include special assessments (Cooley on Taxation, 606–7). Furthermore, section 158 entitles the purchaser at a void tax sale to have refunded to him the "*amount paid by him.*"

So that by no possibility could this section have any application to the present case.

IV.

The Defendant in Error is Not Without Remedy if the Judgment in this Case is Reversed.

Whilst, as we have shown, the defendant in error has no legal right to recover against the District anything in respect of his tax-sale certificates, yet Congress has provided for an equitable settlement of his claim. In the District Appropriation bill, approved August 7, 1894, it is provided:

"That the accounting officers of the Treasury, in the settlement of the accounts of Josiah Dent, Thomas P. Morgan and William J. Twining, late Commissioners of the District of Columbia, are hereby authorized and directed to credit and allow audit numbered fifteen thousand and seventy-seven, made in favor of John F. Cook, Collector of the District of Columbia, October seventeenth, eighteen hundred and eighty-one, for four thousand and seventy-nine dollars and seventy cents, on account of the redemption of special tax-script certificates numbered, respectively, eight hundred and nineteen, nine hundred and fourteen, nine hundred and twenty-six and nine hundred and twenty-eight: *And provided further*, That in crediting and allowing said audit fifteen thousand and seventy-seven, as aforesaid, no money on account thereof shall be paid out of the Treasury of the United States, and the Secretary of the Treasury is hereby authorized and directed to deliver the said special-tax script certificates to Isaac S. Lyon, the owner thereof."

It is possible that the defendant in error might have maintained a bill in Equity to rescind the contract of purchase and get back his paving stock.

This relief is afforded him by the above act.

If the defendant in error accepts the settlement provided for by Congress, and his certificates are returned to him, he

will be entitled to have them redeemed in "drawback certificates" under an act of Congress approved June 2, 1890, (26 Stat., 124) which certificates are equivalent to money, because, "receivable for all arrears of general taxes due and unpaid on and prior to the 20th day of June next preceding the issue thereof."

For the foregoing reasons the judgment of the court below should be reversed and judgment rendered for the plaintiff in error.

SIDNEY T. THOMAS,
ANDREW B. DUVALL,
Attorneys for Plaintiff in Error.

Office Supreme Court U. S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

DISTRICT OF COLUMBIA, *Appellant*,
vs.
ISAAC S. LYON, *Appellee*. } No. 135.

BRIEF AND ARGUMENT FOR APPELLEE.

ISAAC S. LYON,
P. P.

Cromwell Bros. Print, 305 7th st. sw.

IN THE

SUPREME COURT OF THE UNITED STATES.

DISTRICT OF COLUMBIA, *Appellant*,
vs.
ISAAC S. LYON, *Appellee*. } No. 135.

BRIEF FOR APPELLEE.

STATEMENT.

This is an action to recover from the District of Columbia the value of certain certificates of indebtedness issued by the District itself and received by it from the plaintiff as purchaser of certain lots, at what proved to be an illegal and void sale thereof for special improvement taxes. The demand of plaintiff is also for money had and received by the defendant to the use of the plaintiff, according to the common law counts, to the damage of plaintiff in the sum of $10,000.

The case was tried in the Supreme Court of the District of Columbia on an agreed statement of facts found on pages 4, 5, 6 of the record, and judgment rendered for plaintiff (20 D. C., 484), and is here on appeal by the District of Columbia.

According to the agreed facts, Henry Birch, contractor, the assignor of the plaintiff, on or about April 1, 1870, entered into a lawful contract with the municipal government of the city of Washington to pave the footways and gutters and set the curb stones in front of lots 1 to 12, inclusive, in square 156 of this city. The work was done by the contractor to

the satisfaction of, and was accepted by, the municipal authorities; but from that day to this the old corporation of Washington has failed to pay the contract price for the work done, nor has its successor ever paid a dollar thereof. But the whole amount thereof, together with the interest thereon, as provided by law, remains unpaid.

Certificates of indebtedness representing the cost of the work were, however, issued to the contractor in 1872, by the District of Columbia as successor of the corporation of Washington, but through the unlawful acts, neglect of duty, and unreasonable delay of the District officials, these have been held to be invalid and uncollectible, the assessment for the work has been annulled, and the property discharged from any claim by reason of the improvement, whereby, as plaintiff contends, the defendant has become charged with liability for the cost of the work, or its equivalent, the value of its unpaid obligations issued therefor, and this suit is to enforce the payment thereof.

STATUTES AND ORDINANCES GOVERNING LOCAL IMPROVEMENTS.

Aside from the agreed statement of facts, the Acts of Congress and city ordinances relating to the improvement in question, which is the foundation of this action, are as follows:

The Act of Congress of February 23, 1865, gave the corporation of Washington ample power and authority to make local improvements (such as the one in question) and to levy and collect a tax to pay for the same, as follows:

"Be it enacted * * * That the said corporation shall have *full* power and authority to lay taxes on particular wards, parts or sections of the city for their particular local improvements, and to cause the curb stones to be set, the foot and carriage ways or so much thereof as they may deem best to be graded and paved * * * and to pay the cost

thereof the corporation of Washington is hereby authorized *to lay* and *collect* a tax upon all property bordering upon such street or alley that may be paved * * *"

Under the authority of this act the Board of Aldermen and Common Council of the city of Washington passed an act on November 2, 1869, for the improvement in question, as follows:

"Be it enacted * * * That the mayor be and he is hereby authorized and requested to cause the curb stones to be set and the footways and gutters paved on the North side of P street North between sixteenth street West and Rock Creek, the work to be contracted for and executed in the manner and under the superintendence provided by law; and to defray the expenses of said improvement a special tax, equal to the cost thereof, *is hereby imposed and levied* on all lots or parts of lots bordering on the line of the improvement, the said tax to be assessed and collected in conformity with the provisions of the act approved October 12, 1865." (67 Council, p. 116, Corp. Laws.)

It will be noted that this act itself levies the tax thereby provided for, and refers only the assessment and collection to the provisions of prior legislation.

The Act of October 12, 1865, referred to above, recites the Act of Congress of February 23, 1865 (above), which gave the corporation power to make improvements and levy taxes therefor in particular wards, etc., and extends the provisions of the Corporation Acts of May 23 and May 24, 1853, to special improvements thereafter made, and provides that the cost of such local improvement unless otherwise provided for in the act or acts ordering the same, shall be levied, assessed, collected, and paid, and the payment thereof enforced in the same manner as is provided by the last two acts. (Webb's Digest, p. 360.)

The material parts of the act referred to, viz., May 23, 1853 (Webb's Digest, p. 155), the Act of May 24, 1853, not being applicable to this case, are:

1. The work shall be advertised and bid for, and only awarded to practical pavers (Sec. 1), that the surveyor shall fix the grade (Sec. 3) and the work shall be under the superintendence of a Commissioner of Improvements, aided by two Assistant Commissioners appointed from among those interested in the improvement (Sec. 4).

2. That the Commissioner of Improvements shall proceed to execute the work "immediately after the expiration of forty days from the passage of any act laying a tax for the purpose of setting the curb stone and paving the footway in any street * * * and according to the proper graduation in front of the lot or lots thereby taxed; and it is hereby understood that the said lot or lots shall alone be answerable for the amount taxed for such improvement," unless the owner shall do the work himself, "in which case the tax laid for the purpose shall be released" (Sec. 5).

3. That upon the completion of the work the commissioner "shall deposit with the register a statement exhibiting the cost of the work in front of each lot or part of lot separately, and the amount of tax to be paid by each proprietor, and the register shall then, without delay, place in the hand of the collector of taxes a list of the persons chargeable with such tax, together with the amount due by each person, and the collector shall, within ten days after receiving such list, give notice in writing to each proprietor" to pay within thirty days, in default of which the tax, with ten per centum interest, shall be collected as other taxes on real property are, that is to say, by sale (Sec. 6).

4. That such work shall be paid for by certificates of stock, commonly known as "PAVING STOCK," issued by the mayor and given to the contractor, and redeemable from time to time as the taxes may be collected (Sec. 8).

The next act, that of June 10, 1867 (Webb's Digest, 467), provided for the appointment of a superintend-

ent and inspector of paving of footways, etc., and enacted (Sec. 6) "That the said superintendent and inspector shall also be charged with the duty of making all assessments on lots or parts of lots bordering on any street, alley or avenue which shall have been paved."

The last act on the subject, that of October 28, 1867 (65th Council, Ch. 6), is as follows:

"Be it enacted * * * That from and after the passage of this act, all taxes assessed on private property * * * for the laying of foot pavements and gutters, curbing and paving alleys, shall be collected as follows: one-fourth of such assessment within thirty days after the service of the notice by the collector of taxes, and the remaining three-fourths in three equal annual payments, for which deferred payments it shall be the duty of the mayor to issue certificates of indebtedness bearing interest at the rate of ten per centum per annum."

The District of Columbia Succeeded to the Duties, Obligations and Laws of the Corporation of Washington.

The Act of Congress of February 21, 1871 (16 Stat., p. 428, Sec. 40), provided that "all laws and ordinances of the city of Washington and Georgetown respectively, shall remain in full force until repealed or modified * * *" Also, "That the charters of said cities (Washington and Georgetown) severally * * * shall be continued for the following purposes, to wit:

"For the collection of all sums of money due to said cities respectively; * * * For the enforcement of all contracts made by said cities respectively, and all taxes heretofore assessed and remaining unpaid; * * * For the collection of all just claims against said cities respectively; * * * For the enforcement of all legal contracts against said cities respectively * * * until the affairs of said cities respectively * * * shall have been fully closed; * * * and (Sec. 41) upon the repeal of the charters

of the cities of Washington and Georgetown, the District of Columbia be and is hereby declared to be the successor of said cities, and all the property of said corporations, and of the county of Washington is vested in the District of Columbia"

MISCONDUCT, NEGLECT OF DUTY AND UNLAWFUL ACTS OF DEFENDANT, RENDERING ASSESSMENT, CERTIFICATES OF INDEBTEDNESS AND TAX SALE CERTIFICATES VOID.

The work was completed on or about November 17, 1870, and accepted; its cost amounted to $2,054.10, and no part has ever been paid (Art. 3, Agreed Facts).

The municipal officers failed to comply with the above specific requirements of law relating to notice, assessment, etc., but, instead, the assessment was withheld from record for twelve months, until November, 1871. In the meantime the then owner had sold the lots in question to an innocent purchaser, and the old corporation of Washington had been succeeded by the government of the District of Columbia, and the offices named had been abolished; yet in November, 1871, the record was erased and altered by the late superintendent and inspector, by interpolating over the signature of the mayor, etc., an assessment against said lots as of the prior date of November, 1870 (Art. 6, Agreed Facts).

On the 9th of March, 1872, the District of Columbia issued to said Henry Birch four certificates of indebtedness against said lots for the cost of said work, and said Birch assigned the same to the plaintiff before their maturity (Record 7, 8, 9, 10).

In June, 1874, these lots were advertised in the annual tax list of the collector to be sold for nonpayment of said certificates; this without the solicitation or procurement of plaintiff or his assignor. The sale was enjoined at the instance of the then owner by a temporary restraining order of the court. Neither the plaintiff nor his assignor, Birch, was

made a party to that proceeding, and knew nothing of it. No further action was taken in that suit, and the temporary restraining order of 1874 remained unanswered and unnoticed until October 5, 1881, when, notwithstanding the "temporary injunction," and in direct violation thereof, the lots were again advertised for sale in the annual list of the collector for the non-payment of said certificates and other unpaid taxes, and were severally sold to the plaintiff, who, in payment for the same, surrendered the said four certificates of indebtedness, paid three dollars in money, and took from the District twelve certificates of tax sale, one for each lot. This purchase by plaintiff was *involuntary* on his part, and was made to protect his interest in his certificates of indebtedness and save the same from sacrifice (Art. 12, Agreed Facts). The certificates of indebtedness ("paving stock") thus surrendered by the plaintiff were accepted as valid by the District, turned into the U. S. Treasury as a cash credit, and computed at $4,079.70, which, with the three dollars paid in cash, make the purchase price at $4,082.70, on October 5, 1881, which amount it is stipulated the plaintiff is entitled to recover, with interest from thence, if entitled to recover at all (Art. 13, Agreed Facts).

Before tax deeds were made by the District of these lots to the plaintiff as purchaser, pursuant to the said tax certificates of October 5, 1881, the then owner filed his bill against the plaintiff in this court, reciting the facts as hereinbefore set out, and alleging that he was an innocent purchaser of the lots in 1871 without notice, and prayed for the cancellation of said tax certificates, etc. The General Term granted the relief as prayed for in the bill (Alley v. Lyon, 3 Mackey, 456), and on appeal by the defendant, the plaintiff herein, the Supreme Court, U. S., affirmed the decision of the General Term (Lyon v. Alley, 130 U. S., 177). Reference is made to these decisions and opinions as well as to the articles of

stipulation filed herein, for a more full, perfect and complete statement of the facts.

These decisions, briefly stated, held, as between Alley, an innocent purchaser of the lots in 1871 without notice, and Lyon, the plaintiff, that the assessment on the lots of the cost of this improvement, the certificates of indebtedness and the tax sale certificates were null and void, by reason of the failure of the municipal authorities to conform to the requirements of the law, as hereinbefore set out.

The result is, the plaintiff has parted with his certificates of indebtedness, and the same have been cancelled by the District, and before this suit it absolutely refused to return the certificates of indebtedness to plaintiff upon his application therefor, and a tender by him of the tax sale certificates in return (Art. 17, Agreed Facts). So that the plaintiff has nothing to show the indebtedness of the District to him as the assignee of Birch, the contractor, except the tax sale certificates, which have been declared void as before stated, and which could not be converted into a deed if applied for.

This action is predicated on this statement of facts.

ARGUMENT.

A.

The District defends against plaintiffs right to recover on the grounds that the collector was the agent of plaintiff in making sale, and hence, if in so doing he committed a fraud, or acted without authority or unlawfully, or violated an injunction of the court, as he did, plaintiff is bound thereby. As well hold that the superintendent and inspector was the agent of plaintiff in erasing and mutilating the records, and thus making an invalid assessment, or no assessment at all. Plaintiff had no control over the city government. Having earned his compensation, he had no other duty remaining, and he had a right to rely upon the implied obligation of the city to use with due diligence its own agencies in procuring the means to satisfy his claim. Reilly v. City of

Albany, 112 N. Y., 30. "Officers are the agents of the municipal body" (Dillon Mun Corp. 531), and when the collector offered the lots for sale, he did so as the agent of the corporation and in pursuance of the law requiring him to sell to collect the amount of tax levied on these lots, wherewith to redeem these outstanding certificates of indebtedness. The collector is no more the agent of plaintiff in selling for the tax than in collecting the tax itself, or some other officer in assessing the tax, or some other officer in supervising the work. He is a public officer and not a private agent.

B.

The District also defends against the plaintiffs right to recover on the ground that the contractor was fully paid when he received the certificates of indebtedness, and that he has no further claim upon defendant. On the contrary, the contractor never agreed to look to the lot for payment, or to any one but the corporation itself, and the law does not require him to do so. The Act of October 28, 1867 (the last one), expressly provided that certificates of indebtedness shall be issued for such part of the cost of the work as shall not be paid by the lot owner within thirty days, but the same act, with equal emphasis, declares that the taxes assessed for paving and curbing "*shall be collected,*" and the principal and interest of these certificates *paid* out of a special tax fund derived from such collections. The law makes the corporation the sole debtor to the contractor for this work, and only postpones the payment of its obligation therefor until it shall realize from the assessment. The certificates of indebtedness themselves expressly recite that the indebtedness is due to the contractor *from the corporation* and not from the lot. The language is, "Be it known that there is *due* from the Mayor, Board of Aldermen and Board of Common Council of the city of Washington, to Henry Birch, or his assigns, $———, for setting the curb stone and paving the footway in

front of square 156, lot 1 to 12, inclusive, * * * the principal and interest of which is to be paid out of a special tax fund," to be gathered from their own collections (Record 7, 8, 9, 10). The certificates express an indebtedness, not against the lots but against the corporation. The older Act of May 23, 1853, was to the same effect. The mayor is (was) authorized and required to issue certificates of stock * * * which stock shall be given in payment for setting the curb stone and paving the footway on any street" (Sec. 8), yet the same act provided that "all such certificates * * * *shall be redeemed* out of the taxes levied and collected for the payment of said imprevements." So that it was as much the duty of the corporation to *collect* the taxes and *redeem* these certificates, as to issue the certificates in the first place. To this end the lot was to be answerable for the amount taxed for such improvement —answerable not to the contractor, for he had no control over it, but answerable to the corporation for the tax, by sale if necessary.

By the law of February 21, 1871 (16 Stat., 428, Sec. 40), the District of Columbia succeeded to every legal contract made by the corporation of Washington, to every just claim against it, to the collection of all taxes remaining unpaid, and to every liability incurred by it. And it became the duty of the District, as successor of the corporation, to see to it that a valid assessment was or had been made, and collect and pay over the same to the contractor in redemption of its certificates. The certificates of indebtedness were issued by the defendant, and they recite an indebtedness of $2,054.70 and interest due to the contractor for his work, and contain in effect a promise to collect and pay it over "out of a special tax fund." Not having done so renders defendant liable.

C.

The District also defends against the plaintiff's right to recover, on the ground that with the exception of the three dollars paid in cash, the plain-

tiff paid the purchase-money, $4,079.70, at the tax sale with its own bonds, its own currency, issued by itself, with counterfeit money as it were, the certificates of indebtedness or "paving stock," with which the same was made, being void and of absolutely no value; and that it makes no difference that the District itself did the counterfeiting, uttering and passing of the spurious money in the payment of a just and lawful pre-existing debt that the District of Columbia itself owed! It will readily occur to a moderately philosophical mind that this is the most convenient method for a municipal corporation to pay off and discharge its legal, valid, subsisting monetary obligations, ever devised or invented by the genius of man! All that is necessary for a municipal corporation to do to rid itself effectually and efficiently of its lawful obligations to pay out money, is to fabricate a certificate of indebtedness, without any color of authority of law, pass it over to the creditor, as the evidence of the debt due, and then get a decision of this court and of the Supreme Court U. S., to the effect that such certificate is void! Such a proposition is as bad in law as in morals.

Plaintiff did not pay in the lawful money of the United States; but he did pay in the very same bonds that the defendant itself fabricated and passed to him, dollar for dollar in lieu of lawful money of the United States, in payment of a valid subsisting claim. Having passed these bonds or certificates of indebtedness as genuine paper, upon the plaintiff, for a full valuable consideration, shall the District of Columbia be estopped from denying their validity, their value, when the plaintiff pays the identical bonds or certificates of indebtedness back to the municipal corporation? To hold there is no estoppel would be to sanction a bare-faced fraud upon the plaintiff. The question thus presented is resolved by the Supreme Court of the United States in the plaintiff's favor. That court in the great case of The Commissioners of Knox County v. Aspinwall, 21 How., 539, holds that

where bonds issued by a county bear on their face a compliance with the law, their validity cannot be questioned in the hands of a bona fide holder. This case is referred to in 1 Dillon's Municipal Corporations, Sects. 521 and 522, and there, and in the following sections, the question of estoppel as applied to municipal corporations is discussed and the authorities collected. In Bigelow on Estoppel at page 421, it is laid down: "It is a well-established rule that a municipal corporation which issues bonds purporting on their face to be executed in conformity with a statute is estopped to deny the truth of such representation when they have been put upon the market." This language fits the case at bar. This is just what was done in the case under consideration. See also the authorities cited in this work at pages 422, 423 and 424; also Dillon's Municipal Corporations, Sects. 939, 940 *et seq.* relating to the recovery back of illegal taxes.

On the other hand, the plaintiff contends that he cannot lawfully be defrauded out of his right to his money by any such artifice as the agreed state of facts shows the municipal officers of the old corporation of Washington, and of the new government of the District of Columbia, undertook to practice in this case. It makes no difference whether the acts complained of were performed by these officers with the express purpose to hinder, delay or defraud the plaintiff or not. It is enough to know that their deeds of commission and acts of omission had that direct tendency.

The controlling fact in this case is that this valid claim, arising out of a valid contract well performed by the contractor, has not been paid, and it amounts to $4,082.70, with interest from October 5, 1881, as per stipulation (Article 19). The right of the plaintiff to recover, no matter on what special ground put, reverts back to and rests finally upon this controlling fact of the non-payment of a just and lawful debt.

D.

The District further defends on the ground that

plaintiff was chargeable with notice as purchaser. It is bad faith on the part of defendant to insist that plaintiff, as purchaser, is subject to the rule of caveat emptor. The twelfth fact was stipulated into the case to meet this very point. The object and meaning of this fact was to relieve plaintiff of any imputation of notice of defects, constructive or otherwise, and to this end defendant agreed that plaintiff had no knowledge whatever of the restraining order, and that neither he nor his assignor were aware of any invalid proceedings connected with said assessment, and said purchase was *involuntary* on the part of plaintiff and made to protect his interest in said certificates of indebtedness and save the same from sacrifice. (Art. 12, Agreed Facts.) Plaintiff's purchase was not to acquire title or buy anything, or speculate for profit, but to aid the District in coercing the lot owner to pay the tax assessed against him for this improvement. The certificates were then more than nine years old and not paid. No other course was open without waiting indefinitely, except to bring suit, as has now been done. When the stipulation of facts was signed by defendant's counsel, they agreed in affect that the plaintiff as purchaser was *not chargeable* with notice, "that his purchase was *involuntary*," made under stress of circumstances from necessity, and to save the obligations of the District, which had been issued to him, from sacrifice. Now, however, to escape paying for the improvement in question they assert the very opposite.

In the present case there was in affect no sale at all. The District was under an injunction from making a sale. It could not have given a deed, and, according to Art. 15 of Agreed Facts, "the collector of taxes was without authority and jurisdiction to sell." Under these circumstances, for the defendant to hold plaintiff bound by a sale made in violation of an injunction, in order to put him under the rule of caveat emptor, is bad faith. After the sale, and after the surrender of the certificates of indebt-

edness in exchange for tax sale certificates, plaintiff had every right that belonged to him as owner and holder of the original certificates. He stood in the same position as before the sale. He lost no right or advantage by the sale and gained no right or advantage; otherwise a base fraud was practiced on the plaintiff.

The District should not seek any advantage under a sale made by it in violation of an injunction, but rather concede, as it has done in the Agreed Facts, that plaintiff is subrogated to his rights as they existed before the sale.

The cases cited by defendant's council upon this point are cases where there proved to be a failure of title after deed, and where the purchase was *voluntary*, and have no application here.

E — Defendant's further contention that a remedy is open to plaintiff, by now receiving the original certificates of indebtedness from the Treasury Department, convert them into drawbacks and use them in paying arrears of taxes, is subject to this criticism, that such settlement was not open to plaintiff until one year ago, and until this suit had been pending for eleven years, and until judgment had been rendered against defendant for the amount claimed, and that it can now be accepted only by a loss of some $1,100 in interest, as contrasted with the amount conceded to be due (if anything) in the Agreed Facts.

I.

Plaintiff contends that upon the Agreed Facts the defendant is liable for money had and received, for service rendered and materials furnished upon this work, and for damages in negligently failing and refusing to cause a proper and valid assessment for this improvement to be made and collected and paid to the contractor, or his assigns, without unreasonable delay.

Beard v. City of Brooklyn, 31 Barb , 142.
Argenti v. City of San Francisco, 16 Cal., 281.

Cummings v. Mayor, etc. of Brooklyn, 11 Paige Ch., 596.
Fisher v. City of St. Louis, 44 Mo., 482.

Upon the question of negligence and failure to provide payment to the contractor through a proper assessment for a local improvement, the authorities are unanimous in holding a municipality liable to the contractor for the cost of the work, under a valid contract, where the assessment has failed—this on the principal that it is the duty of the officers to see that a proper assessment for the improvement is made and that the money is collected thereon and paid over to the contractor within a reasonable time after the completion of the improvement. Several cases to illustrate the doctrine are here given:

In Morgan v. City of Dubuque, 28 Iowa, 575, where the plaintiff built a sidewalk for the defendant, a municipal corporation, for which he was to receive pay when the city collected the cost thereof by assessments made upon the adjacent lot owners, it was held that the city was bound to collect the assessments, or to make an effort so to do, within a reasonable time after the performance of the work, and that its failure so to do rendered it liable to pay the stipulated price of the work (citing 1 Greenleaf, 79), and that the burden of proof in such case is upon the city to show diligence in endeavoring to collect.

In Kearney v. City of Covington, 1 Met. Ky., 339, the following syllabus appears: "Where a person is employed by a city council to do work on a public street under an agreement that he should be paid for it when completed, by a tax on the lot owners, if the city fails to adopt such measures as the charter requires to render the lot owners responsible, it is liable to the contractor." And the court in this case said: "The city is liable for the violation of her implied undertaking that the work should be paid for by the owners of the lots."

In Cummings v. Mayor, etc. of Brooklyn, 11 Paige Ch., 596. The complainants contracted, in 1836, with the corporation of Brooklyn to grade and regulate Hamilton avenue between certain points, for which they were to be paid a fixed sum when the money should be collected from the assessment which was to be made for such improvement. An imperfect assessment was made and the contractors were unable to get their money. Suit was brought in 1839. The court held that "the fair construction of the contract is that the complainants shall be paid for their labor when the assessment shall be made and collected, and that the corporation will cause such assessment to be made and collected without unreasonable delay after the work is done, and defendants having failed to do this they are liable."

In Fisher v. City of St. Louis, 44 Mo., 482. Plaintiff, in 1866, contracted with the city for filling up certain ponds situated on private property within the city limits. The contracts provided that the work should be paid for in special tax bills assessed against the owner or owners of the property when the work was done, and that the delivery of such tax bills to the contractor should be in "full payment" for such work. Plaintiff performed the work and received in payment the tax bills which proved to be invalid and uncollectable, having been issued without legal authority. Suit was brought to recover the contract price of the work. The court decided for plaintiff, in 1869, holding the city liable.

In Argenti v. City of San Francisco, 16 Cal., 281. The city contracted, in 1853, with the assignors of plaintiff to grade, pave and sewer Mission street between certain points, under a law which provides that the expense shall be paid for by the property along the line of the street. The work was done and accepted by the city and warrants were issued and delivered to the plaintiff by authority of the city, and, upon demand, payment was refused.

The court gave judgment for plaintiff, and upon motion for a rehearing Chief Justice Field, in giving plaintiff a smaller sum, held the city "primarily liable" for the cost of such improvements (decision in 1860).

In Beard v. City of Brooklyn, 31 Barb., 142. One James Collins, plaintiff's assignor, contracted with the city of Brooklyn to grade, regulate and form an arch in Clinton avenue. The contractor was to receive payment for the work as the money should be collected on the assessment therefor. The expense of such work, under the law, was to be charged upon the owners of the land benefited thereby, and the assessments were to be paid into the city treasury. The work was completed by the contractor March 19, 1849. Upon suit, the court held (p. 151) that a city "cannot, with impunity, enter into contracts with individuals, by which they are induced to expend their labor and substance, in works of public improvement, and then refuse or negligently omit to employ the means given it by law for their recompense and reimbursement," and gave judgment for plaintiff, holding further that the city was, in duty, bound to take all necessary measures to have the assessment collected but had not done so.

The Commercial National Bank v. City of Portland, 24 or 188, decided in 1893, was a case where a contractor had made an improvement under an express agreement that he "will not require the city, by legal process or otherwise, to pay for the improvement out of any other fund" than that to be raised by special assessment. Upon completion of the work city warrants were issued to the contractor, but before the collection thereof the collection of the assessment was enjoined, and the city made no effort for five years to press the injunction sent to trial. The bank, as assignee, brought suit for non-payment of warrants and recovered judgment.

The court (Judge Lord) said:

"When the city orders a local improvement the duty devolves upon it to put the necessary machinery in motion to raise the funds to pay for it by assessments upon the property affected. The stipulation of the contract to look to a special fund did not absolve the city from the duty of putting the necessary machinery in motion to raise and collect such fund to redeem its obligations and to pay the warrants in question. So that if a city fails to perform its duty, or owing to its neglect or unreasonable delay fails to obtain such fund, it is guilty of breach of duty and is liable."

Same doctrine in:

Little v. Portland, 26 Or., 235.

In Reilly v. City of Albany, 112 N. Y., 30, where the contract provided, among other things, that "payment for the work shall not be required until the same shall have been collected by the chamberlain from said assessments" against the property benefited; work was performed in 1881, approved and assessed in 1882, but upon suit brought, the assessment was set aside in 1883 and no new assessment made. In 1885 the assignee brought suit to recover the price of grading, paving, etc., and the court held the city negligent and liable and gave judgment for plaintiff.

The court (Ch. J. Ruger) said:

"Where the contractor had performed his work according to his contract he had no duty remaining to discharge, and then had a right to rely upon the implied obligation of the city to use, with due diligence, its own agencies in procuring the means to satisfy his claims. * * * For an omission to do so it would become liable to pay such damages as the contractor might suffer by reason of its neglect of duty."

Citing many authorities, including:

11 Paige, 596.
89 New York, 189.
108 New York, 49.

II.

Plaintiff claims the District is liable as original debtor or guarantor upon its obligations (certificates of indebtedness) issued to the contractor for the cost of the work.

Although the certificates of indebtedness were so far invalid as not to create any obligation on the part of the lot owner to pay them, they were valid as between the District and the contractor and his assigns. There was legislative authority for their issue. They were made negotiable, and in the form and for the express object and purpose contemplated by law. The recitals in them were true, viz: that there was due to the contractor, or his assigns, from the corporation of Washington, the sum of $———, "for setting the curb stones and paving the footways in front of lots 1 to 12, square 156," and that they were "issued in pursuance of an act of the Board of Aldermen and Board of Common Council of the city of Washington." Moreover, the certificates express an indebtedness not against the lots but against the corporation, and defendant has succeeded to this unpaid indebtedness.

Much litigation has occurred relating to the issue of negotiable obligations by municipalities and counties in aid of public improvements, and the courts have held in cases where negotiable obligations have been issued and their payment resisted on the ground of irregularities, or the non-observance of some condition precedent or want of power to issue them, that having issued negotiable obligations and received benefit from them, having also published by recitals therein that the obligations were issued in pursuance of law, that a purchaser had a right to assume from the mere fact that they were issued, that the condition on which the municipality was authorized to issue them had been complied with, and that the recitals in the instrument amount to an estoppel upon the municipality of which the officers issuing

them were the public agents; also that the municipality was, itself, the judge, and its decision final, as to whether all the requirements of the law of their issue had been complied with; also that the papers on their face if expressive of the fact, import a compliance with the conditions relating to the right and power to issue them.

73 New York, 238.
19 Upper Canada, Q. B., 207.
18 Gratt., Va., 338.
21 How., 539.

It is also held that individuals dealing with municipal corporations may assume that acts of their agent which are published and held out as valid, are, in fact, as represented, and that the corporation having received the fruits of engagements entered into on the faith of such representations should be estopped from alleging irregularities to avoid them.

It is a self-evident proposition that the law will not suffer the defendant on the one hand to insist that the work was paid for by the certificates or bonds of indebtedness, while on the other to insist that the bonds are worthless, as having been issued without the sanction of law.

The circumstances that these certificates were paid back to the District at what proved to be a void tax sale, and other invalid certificates received in their place, does not affect plaintiff's right to recover what these certificates express. The tax sale having been enjoined when it was made, became in effect no sale, and no rights were lost or gained by either party by such sale; and whatever obligations existed on the part of the District with respect to these certificates of indebtedness before the sale, remained with the same force and effect afterward—since the order forbidding the sale annulled and made void what was done by both plaintiff and defendant. Hence the tax sale certificates are treated in this case as merged in the original certificates or paving stock.

And although the tax sale certificates do not call for money the District is obliged to redeem them in money, because it received the equivalent of money for them (certificates of indebtedness), which, though invalid, were binding upon it to redeem.

III.

Plaintiff claims that he is entitled to recover in this action, under the provisions of section 158 of the Revised Statutes relating to the District of Columbia. The section provides as follows:

"In all cases of sales of real property for taxes due the city of Washington where such sale shall not have been made according to law and void, it shall be lawful for the proper authorities on the application of the purchaser or other person entitled under him, to refund and pay to such person the amount paid by him on account of such purchase, and also the subsequent taxes accrued and paid on the same property."

This statute relates as well to sales for unpaid special taxes as for unpaid general taxes. A preceding section (153), which grants the authority for making such sales, provides that sales may be made to satisfy unpaid taxes of either kind without discrimination.

To entitle a purchaser to recover under this statute, according to its terms, it is only necessary that the sale for taxes "shall not have been made according to law and void."

The defendant has voluntarily stipulated that the sale in this instance was not made according to law and void, and hence has brought the case squarely within the application of the statute. Defendant has, in fact, conceded plaintiff's right to recover under this act.

Article 15 of the Agreed Facts is as follows:

"The assessment was illegally levied, and the collector of taxes was without authority and jurisdiction

to sell, and said sale was not made according to law and void."

Defendant has thus adopted the precise language of the statute, which entitles a purchaser to a refund of his money, and has in effect agreed with plaintiff that this section covers, if it does not actually grant, his right to recover in this case. In other words, defendant admits that this case contains the very condition which is requisite to make the statute operative in any case. Otherwise, article 15 of Agreed Facts is without meaning.

It is not merely the sale proper—the bare act of selling—the inviting of bids, and the knocking off of the property to the purchaser, that must be made contrary to law and void, to entitle a purchaser to a refund of his money. The law contemplates errors back of this.

A sale not made according to law and void, presupposes a want of authority to sell, or that the sale is invalid by reason of a failure to observe some of the precedent requirements of the statute conferring the right to sell, whereby, as in this case, no deed can issue to the purchaser.

Section 158 contemplates that a sale not made according to law and void may result from an erroneous or invalid assessment like the case in issue; for section 159, which follows, provides for re-assessing upon the property the amount so refunded. Re-assessing means a second assessment, and these two sections taken together recognize possible errors in assessment proceedings which may invalidate a sale, while they furnish a remedy by a refund of purchase-money and a re-assessment of the property.

A sale not made according to law and void, necessarily includes a sale made in violation of an order of the court forbidding it.

The Supreme Court of the District of Columbia by its prohibitory writ had commanded defendant not to make that sale at the time it was made.

An injunction until revoked, must be implicitly obeyed as well as the law, and acts done in disobedience thereof have no force or effect, and confer no advantage.

The Agreed Facts in this case (articles 8 and 11) show the sale to have been made in violation of a pending injunction of the Supreme Court of the District of Columbia, and the assessment proceedings are found to have been so unauthorized and irregular as to invalidate the sale (articles 14 and 15).

These facts of themselves, apart from the decision of the Supreme Court of the District of Columbia, and Supreme Court of the U. S., and the admission of defendant that the sale was not made according to law and void, should entitle the plaintiff to recover under the statute.

The statute contemplates the refund to a purchaser, not when the title to the property has failed, but where it is manifest there was no authority to make the sale at all; where, as in an execution sale, there is no judgment or execution; where there has been in effect no sale; where the sale was so far unauthorized and without authority that there was nothing to sell; where nothing was sold and nothing passed to the purchaser; where, as in this case, the defendant is unable to comply with the obligations created by the sale; where it is unable even to issue a deed; where the fruits of the purchase could not be secured to the purchaser; where, in fact, a sale should not have taken place, whether enjoined, unauthorized or void from an invalid assessment.

The law allowing this refund of purchase-money enters into the contract of sale. The purchaser buys with this statutory guarantee that if the sale shall not be made according to law and void, he shall have his money returned to him upon application. No fault is attributable to the plaintiff. Articles 9 and 12 of the Agreed Facts expressly state that neither plaintiff nor his assignor, Birch, had any notice or knowledge of the injunction or any of the invalid

proceedings connected with the assessment, and that the plaintiff first learded of the defects as late as 1882, and took immediate steps to correct them. It is, therefore, admitted that plaintiff did not purchase with notice (article 17) of any defects or irregularities.

The law just quoted does not charge the purchaser with notice of defects, or of extent of delegated powers, or regularity of proceedings, or correct performance of official duty on the part of defendant, but simply gives relief where the sale for any reason, with or without knowledge on the part of the purchaser, shall not have been made according to law and void—the design being to reimburse all who purchase at tax sale and lose all benefit of their purchase through void proceedings.

In this case it has been judicially determined that the sale was void and made contrary to law. Agreed Facts, article 14; 3 Mackey, 456; 130 U. S., 177. This decision of itself, aside from defendant's admission to the same effect, brings this case within the terms of the statute and plaintiff is entitled to recover.

It is not on the ground of the failure or quality of title that a refund is asked. No title is asserted or claimed under the sale, nor is any defect or irregularity claimed in the proceedings of the sale proper, what the auctioneer said or did, but claim is made because the proceedings leading up to the sale were all contrary to law, and the sale itself shared the same disability.

IV.

Plaintiff contends he is entitled to recover for want of authority and jurisdiction on the part of defendant to make the sale.

Even when the courts have applied the rule of caveat emptor to a purchaser in suits for a refund of money paid at the tax sale, through failure of title, they have invariably made exceptions in cases where

there was no authority or jurisdiction to sell—as when there was no tax due at the time of sale, or the tax had been paid, or the property was exempt.

In this case the defendant had no jurisdiction over these lots and no authority or right to make the sale.

1. Because jurisdiction over the sale of the lots had been denied the defendants by the injunction of June 29, 1875, in force at the time of the sale (article 8 of Agreed Facts).

2. Because at the time of sale no tax was, in fact, due on the property. No tax had been assessed. There had been no assessment. The person who undertook to assess the property was *functus officio*—was not the official charged with such duty, and had no more authority in the matter than a stranger.

Defendant in article 15 of the Agreed Facts, clearly and positively admits that it was "without authority and jurisdiction to sell," and states the reasons why.

The injunction in its true spirit, forbade the defendant from taking plaintiff's certificates and money, as well as making a sale to him and giving him tax sale certificates. It commanded the defendant in effect not to do either.

Besides altered records, interpolated entries, without notice to anybody or approval by anybody, by some one acting without authority or right, did not make an assessment, and did not impose upon the property any lien or tax. The court has in this case so held.

The Supreme Court in deciding this case said that "taxes not assessed are no liens," and "that no lien upon the lots in question exists." This language, coupled with the Agreed Facts, establish that there was no tax and no lien upon the lots when the sale took place. Hence, there was no authority on the part of defendant to make the sale any more than to sell property against which no tax exists, or upon which the taxes have been paid, or where the property is exempt—cases in which courts grant relief to a purchaser at a tax sale.

In Chapman v. City of Brooklyn, 40 N. Y., 372, where action was brought to recover back the money paid at a tax sale with interest, on the ground of want of jurisdiction, in consequence of an illegal assessment, it was held that an action would lie for the recovery of money paid to the corporation upon the purchase of real estate sold by it for the collection of an assessment made to defray the expense of a street improvement when the assessment was illegal, and for this reason no title was acquired by the purchaser. The court held that the assessment proceedings and sale were absolutely void for want of jurisdiction—the assessment not having been made against the real owners of the lots.

In Ridout v. Inhabitants School District No. 5, Dunstable, 1 Allen (Mass.), 232, in an action to recover back a school tax for the reason that it was illegally assessed, the illegal assessment consisting in the fact that the meeting which voted the tax was not legally warned, judgment was given for plaintiff by reason of want of authority in the district to raise money by the vote which was unauthorized and the assessment illegal.

In Joy v. County of Oxford, 3 Maine, 131, where lands had been sold by the county treasurer for nonpayment of a tax and redeemed by the owner, it was held that the purchaser at tax sale might recover back the money so paid, in an action for money had and received against the county, on the ground that the proceedings imposing the tax were illegal—the court making the assessment having no jurisdiction, and the tax was assessed without authority.

In Norton v. Rock Co., 13 Wis., 684, in an action to recover the amount of certain tax sale certificates, the sales on which they were issued having been void, the court held the county liable upon the ground that there was no authority to make the sale.

In the latter case the court (J. Paine), in commenting upon the quality of risk that a purchaser under took at a tax sale, held that the purchaser did not

take the risk of there being no authority to sell, and added "It might be prudent for him to examine into the matter for his own safety. But we do not think he is bound to do so at the risk of losing his money. On the contrary, when the proper officers offer to sell land for taxes, or on execution, he may assume that they have authority, or if they have not, may recover his money;" holding that it was analagous to an execution sale where there was no judgment or execution, and hence no authority to make a sale at all.

V.

Plaintiff claims that the defendant should refund to him his purchase money with interest, because the sale by defendant and payment by plaintiff were made through a mutual mistake of fact.

The defendant had been personally served with an order of the court, as also the collector of taxes, restraining the sale of these lots, and the collector had entered the order of record as applying to the same numbered lots in another square.

The pleas of the defendant admitted that the collector advertised and sold the lots through mistake, which mistake was not discovered until after the sale.

When plaintiff purchased, the lots were sold to him in pursuance of a public advertisement required by law to be annually published of all taxes in arrears, and this advertisement, in addition to a list of other special taxes in arrears, specified the amount of taxes due on lots 1 to 12, square 156.

The defendant has not pleaded caveat emptor, or set up any defense whatever under this rule of law.

It is admitted by the defendant that neither the plaintiff nor his assignor was aware of any proceedings rendering the assessment or the sale invalid when he paid his money and that plaintiff's purchase was *involuntary* and to save his interests from sacrifice.

Art. 12 of Agreed Facts is as follows: "At the

time of said sale and purchase, viz: October 5, 1881, this plaintiff had no knowledge whatever of the restraining order passed in said cause No. 4450, or any of the proceedings therein, and neither he, nor his assignor, Birch, were aware of any invalid proceedings connected with said assessment, and said purchase was *involuntary* on the part of the plaintiff and made to protect his interests in said certificates of indebtedness and save the same from sacrifice." The doctrine of caveat emptor does not apply to a purchaser even at a tax sale, where the purchase is involuntary—made under a stress of circumstances whereby there is no alternative but to buy or submit to a loss of one's rights or property. Art. 12 protects plaintiff from any claim under this doctrine.

Thus plaintiff had no knowledge of the injunction proceedings. No notice was ever served on him. He was not made a party and he never knew or heard of this injunction or restraining order until after he had purchased.

Yet if plaintiff had the means of knowing the true state of the case, so also had the defendant, and there is no more negligence in plaintiff failing to obtain the knowledge or in acting as he did, than in defendant proceeding in direct violation of an injunction after being personally served with a notice thereof.

The defendant having been itself enjoined, and having in its own keeping the records of the proceedings relating to this tax, was bound in greater degree than plaintiff to know the facts, and if want of such knowledge is ground of complaint, defendant is more censurable.

Plaintiff had a right to suppose that defendant had jurisdiction to sell these lots, and that a valid tax for this paving was due and collectable by the method adopted. He had a right to suppose that the District officials had conformed to the law in making a valid assessment, and believing, as he did, that the tax was legal, it was his duty to appear at the sale and purchase, as this was a step in the regular proceed-

ings authorized by law for enforcing the collection of a special tax. He had no other means of relief than by purchasing at a sale. Such action should not prejudice his right to reclaim the money, if paid wrongfully and in ignorance of his rights.

Allen v. Mayor, etc. of City of N. Y., 4 E. D. Smith, 404.

Mayor v. Mayor, etc. of City of N. Y., 63 N. Y., 455.

It is said by Justice Marcy in the case of the Franklin Bank v. Raymond, 3 Wendell, 69, that "the general principle of law is undisputable that if a party pays money under a mistake of the real facts, without any negligence imputable to him for not knowing them, he may recover back such money."

Plaintiff at the sale, paid the full amount then due as the same had been duly stated and published by the collector, together with all the damages thereon, amounting to $4,082.70. It is true the certificates of indebtedness constituted a portion of the payment, but it must be remembered that these certificates were in the nature of due bills or acknowledged debts against the corporation in favor of the contractor; that on their face and by their recitals they import a liability on the part of the corporation to the contractor or his assigns; that they in terms declare the corporation to be debtor to the contractor for the amount expressed; that these certificates were payable from a fund which the corporation has assumed to collect and pay over to the holder of them for their redemption: that at the sale the collector accepted these certificates as valid, computed their present value, redeemed them and accepted their amount from plaintiff as a credit of so much money received upon the purchase of these lots, and afterwards cancelled and transmitted them to the Treasury Department, where they were accepted as valid and as representing $4,082.70 cash, in the accounts of the collector.

Moreover, the defendant having issued these certi-

ficates of indebtedness in payment for the contractor's work and materials upon the improvement in question, is estopped from setting up their invalidity as an escape from liability upon them. Peoria & Springfield R. R. Co. v. Thompson, 103 Ill., 187.

VI.

Plaintiff demands the return of his purchase-money with interest because of a total failure of consideration.

No argument is needed to show a total failure of consideration, or that defendant is unable to issue a deed, or otherwise comply with the terms of sale.

Besides, article 17 of the Agreed Facts shows that plaintiff, as soon as he learned of the unlawful proceedings, undertook to restore to defendant what he had received and to get back what he had paid out—that he applied to defendant to return to him the certificates of indebtedness and money so paid, tendering the tax sale certificates in return—in other words, to be restored to his condition before the sale, and defendant refused—thus showing that timely and proper efforts were made by plaintiff to trade back, or secure justice from the defendants, but without avail.

In any view of the case, plaintiff is entitled to be restored to his rights as they existed before the sale, because a sale made in violation of an injunction is no sale, and because plaintiff's interests should not suffer, or he be put in a worse position, or defendant gain any advantage through a sale made in violation of an injunction.

Thus it is that plaintiff parted with value and got nothing, and hence should have his purchase-money returned with interest, because of a total failure of consideration.

APPENDIX.

Mr. Justice James delivered the opinion of the

court below in this case, and after reading the Agreed Facts as a part thereof, said:

"We are authorized, by consent of counsel for both parties, to add, as a part of this stipulation, that the lots in question were sold on Oct. 2, 1871, by the party who owned them when the special improvement was made.

"The work done in making the special improvement in question was done under an ordinance of the city of Washington passed November 2, 1869. That act provided for levying a special tax on all lots 'bordering on the line of the improvement,' and that the tax should be assessed and collected according to the provisions of the Act of October 12, 1865. This act extended the Acts of May 23 and 24, 1853, and provided that the cost and expenses of every local improvement thereafter made, unless otherwise provided for, should be 'levied, assessed, collected, and paid, and the payment thereof enforced' as provided in the said acts of 1853.

"Briefly stated, the effect of these acts was to charge the municipality, not with a direct indebtedness for the work done under its ordinance, but with a duty to work out a payment therefor by seeing to it that the cost should be charged as a lien upon adjoining lots, and by enforcing this lien and collecting the special tax from the lot owners. By the operation of certain provisions of the Act of Congress of February 21, 1871, commonly known as the Organic Act, section 91 and sections 94–96, Rev. Stat. of District of Columbia, the District became invested with authority, and was charged with the duty, to secure such liens and collect and pay over to the contractor such taxes, in payment for work done under an ordinance of the city of Washington. This power could have been exercised and this duty could have been performed in the present case at any time before the 2d day of October, 1871, when it was cut off by the sale of the lots in question to an innocent purchaser.

"Numerous authorities show that where a municipality omits to perform its duty to collect the tax which had been provided as the means of paying for the work done at its request, it becomes chargeable directly with the indebtedness. See Morgan v. The City of Dubuque, 28 Iowa, 575; Kearney v. City of Covington, 1 Metc., Ky., 339; Cummings v. Mayor, etc., of Brooklyn, 11 Paige, Ch. 596; Fisher v. City of

St. Louis, 44 Mo., 482; Argenti v. City of San Francisco, 16 Cal., 281; Beard v. City of Brooklyn, 31 Barb., 142. The principle on which these cases were decided seems to be, not that the municipality is held liable for neglect of duty, but that its liability arises by fair construction of contract. To this liability the District succeeded.

"If the resource of payment out of the special tax could have been secured by the District, and was lost by its omission, a duty to pay the contractor would fairly belong to the District, and an issue of certificates of indebtedness to him would not be a void act. All such certificates are by law negotiable, and in this particular case they appear to have been assigned for value to an innocent purchaser. Neither he nor the authorities of the District appear to have been informed of the injunction which forbade a sale of the lots, as a means of satisfying them. The plaintiff therefore acted in good faith in making the purchase at the tax sale.

"It is insisted, however, on the part of the District, that, in making the sale of the twelve lots to the plaintiff, the collector acted as his agent for the collection of his certificates of indebtedness, and was not acting for the District of Columbia; and that if the agent's act was invalid, his principal, the plaintiff, must bear the loss. We do not think this proposition is either true or to the point. In collecting taxes—although it be done for the purpose of providing means to pay a particular person—the authorities exercise their own public functions, and cannot be regarded as private agents. In the next place, whatever might be the capacity in which the collector acted, the District received and has retained the proceeds of the transaction. In that respect it treated the sale as made on its account.

"The final question, then, is, what is the remedy?

"If these certificates were valid they represented, and were received as constituting the value named in the stipulation. As between the parties they were purchase money. The sale gave nothing to the plaintiff, but the District retains, and has disabled itself to return, his certificates of indebtedness. We think it is liable for the amount of these certificates.

"*The judgment will therefore be for the amount stated in the stipulation, with interest.*"

ISAAC S. LYON, *P. P.*